

titution; and if the relict had been pursued, she would have had retention of her third, which will exceed the worth of the goods poided, and so they may be esteemed her proper goods, seeing she was in possession at the time, and 40 days before the working, useing, milking, and keeping them as her own; and the time of the poiding, none compeared to make faith that they were theirs; and the farthest that can be craved is restitution. Repels the allegiance and duply, in respect of the reply and summons, and possession therein qualified, but reserves the modification of the violent profits to the Lords.

Clerk, *Hay*.

Fol. Dic. v. 2. p. 389. Nicolson MS. No. 173. p. 123.

No. 18.

1626 July 26.

RUSSEL *against* L. KERSE.

IN an action of spuilzie pursued at the instance of one Janet Russel against the Laird of Kerse, who was convened for spuilzie of corns growing upon the lands libelled; and the spuilzie libelled to be committed in January 1624, and the corns being of the growth of the crop, 1623; the husband of this pursuer, who sowed the corns of this crop, dying in September 1623, before the spuilzie; whereby the defender alledged, that the corns of that crop, alledged spuilzied from the pursuer, behoved to pertain to her husband, who was his tenant of the lands, and sowed that crop and corns, he dying in September that same year as said is, at which time the corns were separated from the ground, and shorn by the defunct, and therefore until his testament were confirmed, the relict could not pursue for the corns alleged pertaining to her, for the same would pertain to his executor, who behoved to be answerable to this defender, for the farms of the lands addebt. by the defunct. This allegiance was repelled, and the action sustained at the relict's instance, without necessity of confirmation, in respect of her possession libelled continually to the time of the spuilzie. Item in this same cause, an exception was proponed upon the comprising of the corns by the birle-men, with consent of the pursuer, and delivery of the same to this defender, for satisfying of his farms owing to him by consent also of the pursuer; which exception was also found relevant, and admitted to the pursuer's probation, which the Lords found relevant to be proved in all the heads thereof, especially anent the pursuer's consent by witnesses, and found no necessity, that her consent should be proved by her oath or writ.

Fol. Dic. v. 2. p. 389. Durie, p. 227.

No. 19.

Spuilzie of corn sustained, at the instance of a relict, against the landlord, though without confirmation, and her husband had died after the corn was separated.

1629 July 7.

LADY RENTON *against* Her SON.

The Lady upon a sasine of the lands of Horslie, *cum decimis inclusis*, pursuing her son for spuilzie of the saids teinds *anno* 1628, and the defender alledging, that he

No. 20.

Spuilzie of teinds.

No. 20.

intromitted by virtue of a lawful tack in his person, set before the pursuers' right, and opposing a nullity against her right; the Lords found, seeing the pursuer alledged possession of the teinds in her person divers years preceding the year libelled, by virtue of her foresaid right, that the excipient could not debar her from continuing her possession *brevi manu* by stopping and apprehending thereof at his own hand, without order of law; and found, that albeit her title had not been good, but that the excipient's had been better, yet that she had competent action to pursue this spuilzie, *quia spoliatus ante omnia est restituendus*, neither was it respected what the defender alledged, that the maxim *spoliatus est ante omnia restituendus*, holds only where there is *spolium corporis ejusdem*, which was before possessed by him who seeks restitution, which is not here, where the pursuer's possession of other crops, cannot infer that she was possessor of this crop libelled, whereof she never had possession; and it was not respected where the pursuer also replied, that there was no other form of interruption against her right and alledged possession in matter of teinds, but only to alledge the insufficiency of her right, and to exclude any pursuit founded thereupon, when the same is drawn in dispute, by maintaining of his own right; for in teinds it is not as in lands, where the possession is interrupted by warning; but in teinds, albeit inhibition be used, yet the same needs not to be used by him who is in possession, so that he needed to serve no inhibition himself, being possessor by virtue of a sufficient right; which reply was repelled, and the spuilzie sustained.

Act. Stewart.

Alt. Nicolson et Craig.

Clerk, Gibson.

Fol. Dic. v. 2. p. 389. Durie, p. 457.

* * Auchinleck reports this case:

A colourable title may sustain action of spuilziation of teinds, where the pursuer has been sundry years in possession, and is dispossessed by him who pretends no right of his own, but to maintain his violent deed of spuilzie alleges the title whereby the pursuer bruiked the teinds was not good; which allegiance the Lords repelled.

Auchinleck MS. p. 21.

1724. July 10. ANNA FALCONER against BURNET of Criegie.

No. 21.

A person being for eleven years in peaceable possession of a moss, to which she and her husband had a disposition, but no in-

IN an action of spuilzie pursued at the instance of Anna Falconer against Mr. Burnet, for wrongously and riotously carrying off the peats which she had caused cast in the Moss of Criegie; the defender objected to her title, and pleaded an exclusive right in this person, in as far as he stood infest in the said Moss, and she not being infest, had no title to insist against him.

It was answered for the pursuer, That she had produced a disposition signed by this defender to her husband and her, of what part of the Muir and Moss of